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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.
75-494

OVERSEAS MOTORS, Inc., a Michigan corporation,

Petitioner

-vs-

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK GMBH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, Inc. (Porsche-Audi Division) a New Jersey Corporation, jointly and severally,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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September, 1975

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No.

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IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK GMBH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, Inc. (Porsche-Audi Division) a New Jersey Corporation, jointly and severally,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Overseas Motors, Inc., a Michigan corporation, prays that a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on June 2, 1975 and on Order denying Rehearing, dated, July 10, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix I, p 5a. The opinion of the United States District Court for the Eastern District of Michigan appears in *375 F. Supp. 499.*

JURISDICTION

The order and judgment of the Court of Appeals on Petition for Rehearing en banc was entered on July 10, 1975. Appendix I, p 22a. The Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under *28 U.S.C.A. 1252 (1)* and pursuant to Supreme Court Rule 19 (1) (b).

QUESTIONS INVOLVED

1. Whether state of Ohio standards of sufficiency of evidence to withstand directed verdict are applicable in a treble-damage antitrust case tried in a District Court of the state of Michigan?

2. Whether the District Court for the Eastern District of Michigan and the Sixth Court of Appeals, in adopting the decision of the District Court, denied Petitioner the right to trial by jury under the Seventh Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT VII

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

STATEMENT OF FACTS

(Appendices attached hereto are designated Appendix I and Appendix II)

(The *Appendix* in *72-2198* (first appeal, on stay of arbitration, later consolidated with *74-1651*) is numbered 1a thru 103a and that numbering is adopted herein; the *Appendix* in *74-1651* runs from 104A and is distinguished by a capital A.

Reference to Petitioner's consolidated Brief will be referred to as *P-Br-1* and Petitioner's Reply Brief as *P-Br-2*. Overseas Motors, Inc. will be referred to as Petitioner; Audi NSU Auto Union Aktiengesellschaft, will be referred to as ANAU; Volkswagenwerk GMBH, will be referred to as *VW;* Volkswagen of America will be referred to as *VWOA;* and Import Motors Limited, Inc., will be referred to as *Import*. The Decision of the Court of Appeals for the Sixth Circuit, will be referred to as *DCA-6*.) The Decision of the District Court will be referred to as 375 F. Supp.

This action is brought by Overseas Motors, Inc., (Petitioner) against Audi NSU Auto Union Aktiengesellschaft (formerly NSU Motorenwerke, Aktiengesellschaft), (ANAU), Volkswagenwerk Aktiengesellschaft VW Volkswagen of America (VWOA), and Import Motors, Limited, Inc., (Import) Petitioner alleges violations of Section 1 and 2 of the Sherman Act, 15 USCA #1-7, 15 USCA 15, 15 USCA 18, Count 1; Section 7 of the Clayton Act, 15 USCA #18 (Count II); and Section 2 of the Automobile Dealers Day in Court Act, 15 USCA 1221-5.

The facts relevant to the question presented by this Petition, except for certain Binding Facts, are uncontroverted and may be introduced to the Court in a summary manner. It was agreed by the trial court and counsel for all the parties, that for the purpose of the Motion for Directed Verdict, all testimony and exhibits in this case were to be accepted and considered as admitted by the trial court. F. Supp 375 p 525; (Vol. 8 1508A, *Vol. 7-1329-1343A* (Vol. #7 - 1385-6A) (1447-8A). Thirty-five Binding Facts (Vol. 7 - 1486-8A) emanating from an Arbitration Award (Vol. #1 - 333-368A) were submitted to the trial judge, who screened out 24, but held that he and the jury were bound by eleven which could not be controverted, viz 1, 2, 5, 6, 7, 12, 15, 17, 23, 25, 29. *Vol. 7 - 1447-8A).*

The Offer of Proofs (*Vol. 7 - 1387-1392A*) list of Exhibits (*Vol. 7 - 1393-1396A*) not previously admitted consisting of 227 exhibits were admitted (*Vol. 7 - 1429-1430A*).

Under the above modus operandi agreement, the trial judge, made a "severance." Viz, that proof of damages was to be deferred pending outcome of the Motion for Directed Verdict. *(Vol. 7 - 1339-1341A) (Vol. 7 - 1457A)*

Petitioner is a Michigan corporation. Prior to July of 1968, it operated a dealership in Livonia specializing in NSU automobiles. After that date it entered into an importer contract with NSU June 17, 1968. (*17a-29a*), later adding California (*31a*).

ANAU, a corporation of the German Federated Republic was formulated by the merger of Auto Union Gmbh (Auto Union) and NSU Motorenwerke Aktiengesellschaft, NSU (Ex. 54, 55, 56). VW owned all of the stock of Auto Union, Ex. 55. (Par. 2) and became the owner of 59.5% of the stock of ANAU; it became owner of 99% of ANAU's stock (*Vol. 6 - 1132A*). VWOA is a wholly owned subsidiary of VW (*Vol. 7 - 1302A*) and it is the sole importer of Porsche and Audi cars in the United States (*Vol. 7 - 1304A*). Import, a Michigan corporation distributed Volkswagen, Porsche and Audi cars in midwestern United States. It is a part of the Volkswagen distribution network, but is independently owned and operated. (*Vol. 1 - 203-4A*)

The Importer Contract's (*Ex. 32*) (*17a-29a*) termination date was extended to December 31, 1973. (*Ex. 46*) Petitioner built a dealer network of approximately 65 dealerships in 65 cities and towns. (*2a. 3a par. 8*) Petitioner was granted the sale of "NSU" cars in 10 states under *Ex. 32* NSU (later California was added, *Ex. 37*). Petitioner's claims, posture and analyses of exhibits are detailed in *P-Br-1* pp 33-57 and *P-Br-2 bottom pp. 3-7, bottom pp. 9-12 and pp. 9-25 in substance as follows:* There were 7 NSU cars which were to be exported to the United States (*Ex. 88*) including the revolutionary Wankelpowered Ro-80, a tie-in vehicle. After the merger, these were cut to one car. The supply of cars to Petitioner was cut off, as the stock transfer from ANAU to VW increased from 59.5% to 99%, beginning in the latter part of 1970. Though the Importer Contract was not to terminate until December 31, 1973, for practical purposes, it was terminated in 1970. No cars were delivered by ANAU to Petitioner in 1971 and 1972, (*2a(4)*). This, it is Petitioner's claim, was an attempt to force Petitioner to accept an earlier termination of the Importer Contract, *Ex. 32*. In this all of the defendants were involved, Petitioner claims the evidence as admitted or proffered fully established its claims. The Petitioner had been promised distribution of the Audi car in its contract area and that Petitioner would be included in the *VW* organization for distribution purposes; *Ex.*

42, but instead the Audi car was channeled thru the wholly owned *VWOA* subsidiary of *VW* and by it thru *Import* as exclusive distributor in some of Petitioner's contract area. Petitioner was induced to file application thru *Import* for a dealership franchise as a first step to the solution of the Petitioner's Contract problem. All steps for the granting of that application, except one, were approved, and that step was the immediate termination of the Overseas Inc. Contract, *Ex. 32*, which Petitioner refused to accept. The granting of the dealer franchise application was dangled like a "carrot on a stick" from December 24, 1969 until February 17, 1972 when the package was sent to *VWOA* with approval of *Import* as to all technical details, where the application still pends, unrejected but not accepted *1292-98, 1300, 1301A*. In contrast, after suit was filed, Petitioner obtained a Fiat dealership within six weeks of its application. *Exhibits 684, 686, 687, 689, 690.*

After suit was filed on September 18, 1972, Petitioner received notice of arbitration from ANAU to be held in Zurich, Switzerland (*33a-38a*) and within 10 days thereafter its Motion to Stay and Abate (*32a*) which was denied, (*P 27a-68a*) the matter was appealed to the Sixth Circuit Court of Appeals. Motion to dismiss the appeal by defendants and a motion to suspend the trial court's order, by Petitioner were made. Both Motions were denied by the Sixth Circuit pending hearing on its merits. (*Vol. 1-312A*) Hearing on the merits came on November 6, 1973, when the Appellate Court 6th Circuit entered its Order deferring further consideration, briefing and consolidating this case with the appeal on its merits. (*Vol. 1 p. 107A*) In the meantime, a trial occurred in the lower court, a directed verdict had been entered against Petitioner, and an appeal taken to this Court (*Vol. 1 106-7A*).

An Arbitration Award (*Vol. 2-333A*) was made shortly before trial, Petitioner did not appear because of the danger of waiving its rights in the first appeal herein. The Arbitration Award was offered in mid-trial over objection by Petitioner and without an offer by defendants to amend pleadings as detailed in *PBR 1 - 5-24*.

The relevant part of decision of the trial court relating to standards of sufficiency to withstand a directed verdict, based on

state of Ohio standards though the case was tried in Michigan is at *375 F. Supp, 525*, Vol. 8, p. *1509A* (footnotes 82, thru 88, *1550-1A*) and is in *Appendix I*, 29a, attached.

The relevant part of the decision of the Court of Appeals relating to the standard of sufficiency is in Vol_____ F2d_____1975 (unreported, copy thereof is in *Appendix I 32a-33a*.

A Petition for Re-hearing was timely filed in the Court of Appeals for the Sixth Circuit, copy in *Appendix I*, 15a.

The Order of the Court of Appeals denying Petition for Re-hearing for the Sixth Circuit is in *Appendix I 22a*.

ARGUMENT AND REASONS FOR GRANTING WRIT

1. The decision of the trial court, adopted by the Court of Appeals, granting directed verdict, was based on mis-application of state of Ohio standards of sufficiency of evidence to withstand directed verdict and was in conflict with the federal standards delineated in BRADY, BYRD, CONTINENTAL, ERIE, GALLOWAY, LAVENDER, SIMLER, TENNANT, AND WILKERSON.[1]

The District Court deprived plaintiff of its right under the Seventh Amendment to the Constitution of the United States in a treble damage, antitrust suit, to a trial by jury which had been empanelled. Such denial was based on a directed verdict against plaintiff, based on state of Ohio standards of sufficiency to withstand directed verdicts. (*Appendix II, 29a, 30a, 31a.*)

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[1] A collation of the tests appear verbatim in Appendix II 46a thru 55a, in the cases cited, viz:

Brady v. *Southern Ry. Co.* 320 U.S. 476, 479-480, 1945; *Byrd* v. *Blue Ridge Cooperative* 356 U.S. 525, 537, 538, 539, 1967; *Continental Ore Co.* v. *Union Carbide* 370 U.S. 690, 696, 1961; *Erie Railroad Co.* v. *Tomkins* 304 U.S. 64, 78, 1937; *Galloway* v. *U.S.* 319 U.S. 372, 395, 1942; *Lavender* v. *Kurn* 327 U.S. 645, 653, 1945; *Simler* v. *Conner* 372 U.S. 221, 1962; *Tennant* v. *Peoria & P.U. Ry. Co.* 321 U.S. 29, 33-4, 1943; *Wilkerson* v. *McCarthy* 336 U.S. 53, 57, 1948.

There is a strong federal policy against allowing state rules to disrupt judge-jury relationship in federal courts.[2]

The right to trial by jury in civil cases is a basic and fundamental feature of our system of federal jurisprudence, protected by the Seventh Amendment and should be jealously guarded.[3]

> In *Simler* v. *Conner* 372 U.S. 221, 222, 1962, the Court said: ". .The right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. . . . Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved. . ."

The Supreme Court has rested its use of a federal test of sufficiency to withstand directed verdict in actions brought under federal statutes on a policy of giving litigants under such acts similar treatment in all states.[4]

While the Seventh Amendment, in order to preserve distinct roles for judge and jury, implicitly requires some test be used to determine when evidence presented is sufficient to warrant jury consideration, the lack of controlling guidance has left the various federal judicial circuits hopelessly split on usable tests, not only among themselves, but in their own circuits, as hereinafter detailed.[5]

The single important question unresolved by the Supreme Court in this area is whether a single test of sufficiency to withstand directed verdict is to be applied in all federal court cases or whether existing tests of sufficiency are to be continued in any or

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[2] *Byrd* v. *Blue Ridge Cooperative*, supra; *Heron* v. *Southern Pacific* 283 U.S. 91, 94-5, 1930.

[3] *Bailey* v. *Central Vermont R. Co.* 319 U.S. 350, 354, 1942; *Baltimore & C. Line* v. *Redman* 295 U.S. 654, 657, 1934; *Beacon Theatres, Inc.* v. *Westover* 359 U.S. 500, 501, 1958; *Jacobs* v. *U.S.* 315 U.S. 752, 753, 1942.

[4] *Brady* v. *Southern Ry. Co.* 320 U.S. 476, 479, 1943 and cases cited therein.

[5] *Dick* v. *New York Life Ins. Co.* 359 U.S. 437, 444-5, 1958 5 Moore, Federal Practice #50.02 (1), p 2330 (2d ed. 1968); Directions for Directed Verdicts: A compass for Federal Courts, Cooper, 55 Minn. Law Rev. 973-976

all federal court cases, whether in Diversity, FELA, Antitrust or other federal and state common law and statutory actions. The Supreme Court can eliminate the existing confusion by promulgating a uniform test applicable to all cases in federal courts or alternatively by clarifying the roles of tests as delineated in *Brady, Byrd, Continental, Erie, Galloway, Lavender, Simler, Tennant,* and *Wilkerson,* supra.[6]

The Supreme Court expressly granted certiorari in *Mercer* v. *Theriot* 377 U.S. 152, 156 (1964) to resolve the conflict between the circuits on sufficiency tests but the question became moot when it was found that plaintiff's evidence was found sufficient to meet either state or federal test.

The learned District Judge applied state of Ohio tests of sufficiency in this case, which was tried in the Eastern District Court of Michigan (Appendix II *29a, 30a, 31a,* 375 F.Supp. 525, Vol. 8, 1509A, footnotes 1550-1A). In support of the test used the trial judge cited two Ohio cases, as well as the controversial Boeing case.[7]

If state tests of sufficiency are applicable in this case tried in Michigan, shouldn't Michigan's more liberal test of sufficiency be applied?[8] ". .Michigan law does not favor directed verdicts. . ." and in the federal system as said in *Byrd*: ". . .it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed questions of fact to the jury.' "[9]

[6] See Appendix II (46a-55a) for verbatim quotations therefrom.

[7] *Boeing* v. *Shipman* 411 F2d, 365, 372-76 (375 F.Supp. 525, n. 84) (See Appendix II40a, 41a; for verbatim quotes on the two Ohio cases relied on by trial court see Appendix II 31a ~~vin~~: *f/z*; *Domany* v. *Otis Elevator Co.* 369 F2d 604, 608, CA6, 1966; *Teti* v. *Firestone and Rubber Co.* 392 F2d 294, 297, CA6, 1968; *Boeing Co.* v. *Shipman* 411 F2d 365, 372-76, CA5, 1969 (Verbatim quotes of test adopted by majority in Boeing, *Appendix II 40a.*

[8] ". . . . .the court must consider the evidence in the light most favorable to the party against whom the direction is sought and *assume* the same to be true . . . . . and the *legitimate inferences to be drawn from the established facts must be viewed most favorably to plaintiff.*" (emphasis supplied) *Kravat* v. *Indemnity Co.* 152 F2d 336, 338, 1945 (approved in *Hull* v. *Holiday Inn* 478 F2d 223, 225, CA6, 1973; see also *Jenkins & Reynolds Co.* v. *Alpena Portland Cement Co.* 147 F2d 641, 642, 3, 4, CA6, 1906. (Verbatim quotes of tests in the above are at Appendix II *35a, 34a, 34a, 35a* respectively.) See also: *Grand Truck Rw. Co.* v. *Ives* 144 U.S. 408, 417, 1891 (Michigan case).

[9] *Serratoni* v. *Chesapeak & Ohio Ry.* 333 F2d 621, 626, CA6, 1964, cert den 379 U.S. 960, Mich-diversity (verbatim quote in Appendix II, *35a; Byrd* v. *Blue Ridge Rural Elec. Cooperative, Inc.* 1958, 356 U.S. 525, 537.

The Michigan test of sufficiency, particularly with reference to inferences, is substantially the same as the federal tests applied in *Continental, Gallick, Lavender,* and *Tennant.*[10]

In sum, if state tests are applicable in the Sixth Circuit, then the Michigan standards of sufficiency as herein delineated should have been applied by the trial judge.

CONFLICTS IN SIXTH CIRCUIT ON TESTS OF SUFFICIENCY

There is a good deal of conflict between the panels of Sixth Circuit as to which test of sufficiency is to be applied. Most opinions follow state tests, frequently without mentioning the possibility of some other approach.[11]

Some of the panels in the Sixth Circuit have opted for a federal test.[12] In the light of the Supreme Court's decision in *Fortner*[13] an antitrust treble damage case, the Sixth Circuit after a retrial opted for a federal test, as it did in *Champion*[14] another antitrust treble damage suit.

[10] *Continental Co.* v. *Union Carbide* 370 U.S. 690, 696, 1961; *Gallick* v. *Baltimore & Ohio Ry. Co.* 372 U.S. 108, 114-5, 1962, (quoting *Tennant*); *Lavender* v. *Kurn* 327 U.S. 645, 653, 1945; *Tennant* v. *Peoria & P.U. Ry. Co.* 321 U.S. 29, 35, 1943.

[11] Directions for Directed Verdict: A Compass for federal courts, Cooper, 55 Minn. Law Rev. 903, 974, n 212; and the following cases: *McDonald and Bratcher* 265 F2d 261, 263, 1959, CA6 (be accepted as true); *Lovas* v. *General Motors* 212 F2d 805, 807, 1964, CA6 ("*assumes the truth of the evidence*"); *O'Donnel* v. *Geneva Wheel Co.* 190 F2d 59, 60, 1950 (*follows state rule under "Erie"*) (But see *Lones* v. *Detroit, Toledo and Ironton RR* 398 F2d 914, 919, 1968 and *Trivett* v. *New York Life Ins. Co.* 283 F2d 441, 443-4, which hints at re-examination of *Lovas* and *O'Donnel*, where in *Trivett* supra, dissent, Judge Pope opts for constitutional standard as in *Pogue* v. *Great Atlantic & Tea Co.* 242 F2d 575, 582, written by Judge Rives, who wrote dissent in *Boeing*, supra 411 F2d 265, 379 et seq.) (See Appendix II 41a, 42a). In *Gilreath* v. *Southern Ry. Co.* 323 F2d 158, 162, footnote 4, court declined to re-examine *O'Donnel, Lovas* and *Trivett* supra. In *Price* v. *Firestone* 321 F2d 725, 726-7, 1963, *Lovas,* supra was still being cited with approval.

[12] *Taylor* v. *Cirino* 321 F2d 279, 281 CA6, 1963, diversity Kentucky.

[13] *Fortner Enterprises* v. *U.S. Steel* 394 U.S. 495, 500, 1969.

[14] *Champion Oil Service Co.* v. *Sinclair Refining Co.* 502 F2d 506, CA6 709-713.

CONFLICTS IN OTHER CIRCUITS ON TESTS OF SUFFICIENCY

There is as much confusion in the other federal circuits and within each of the circuits as there is in the Sixth Circuit. They too are snagged in the procedural underbrush.[15]

The controversy peaked in *Boeing*[16] which adopted its own test of sufficiency, ~~was~~ over a vigorous protest by Rives, J. who opted for a constitutional test. *Boeing* overruled *Planters*[17] a diversity case, which had applied the FELA test of *Lavender*, despite the fact that the Supreme Court had refused to interfere by denial of Writ of Certiorari (389 U.S. 930) with the decision of the Chief Judge of the Fifth Circuit. Since *Boeing* was not taken up by certiorari the test of sufficiency adopted by the majority remains a decision of the Fifth Circuit and only adds to the confusion. Judge Rives suggested three constitutional federal tests as his contribution to a solution of the problem;[18] and he still adheres to the views expressed in his dissent.[19]

SUFFICIENCY TEST PROBLEM UNRESOLVED BY PRESENT SUPREME COURT DECISIONS

Simler[20] teaches that the right to jury trial is to be determined as a matter of federal law in *all* actions in federal courts but

[15] *Directions on Directed Verdict*, A Compass for Federal Courts, Cooper, 55 *Minnesota Law Review*, 903, 974, footnote 212, 1971; *Utah Law Review*: *Multiple Sufficiency Tests in Federal Courts: The Scope of Lavender*, 1970, page 156, footnote 10; *5 J. Moore*, Federal Practice 50.06 2d ed. 1969; *Barron & A. Holtzoff*, Federal Practice & Procedure, 1072, at 367, n 5, 2BW Barron & Holtzoff, n 69, 1075, p. 403, n 53.20; Other treatises and authorities discussing standards in the Federal Judicial Circuits are: *5 Moore*, Fed. Pr. 50.02 (1) pp. 2320-1; *Wright and Miller Fed.* Pr. 2524, pp. 540-547; 2528, pp. 563-571, 2529, pp. 572-574; *Texas Law Review* Vol. 42, 1053, 1054-1062; *Michigan Law Review* Vol. 48, pp. 570 (573-4) 576-581; *Michigan Law Review* Vol. 47, pp. 974-978; *Harvard Law Review* Vol. 66, 1523-1525, 1953.

[16] *Boeing* v. *Shipman* 411 F2d 367 (374-5) CA5, 1969, dissent (377-394) (verbatim quotes in Appendix II *40a, 41a*.

[17] *Planters Mfg. Co.* v. *Protection Mutual Ins. Co.* 380 F2d 862, 862, 874, CA5, 1968, cert den 389 U.S. 930 (verbatim quotes in Appendix II *44a, 45a, 46a*.

[18] *Boeing*, supra 411 F2d at 394; (verbatim quotes in Appendix II *41a*.

[19] *Robertson* v. *Douglas SS Co.* 510 F2d 829, 837 (verbatim quote in Appendix II *43a, 44a*.

[20] *Simler* v. *Conner* 372 U.S. 221, 222, 1962

whether to adopt a universal test of sufficiency or a unitary one based on specific types of actions in such cases has not been reached by the Supreme Court.

The Supreme Court has said that the Seventh Amendment prohibits interference by directed verdict where the evidence raises a jury question;[21] has indicated that Congress intended Seventh Amendment tests to govern the relationship between judge and jury in FELA cases;[22] has cited FELA opinions as if they established the general test of directed verdicts;[23] has stated that in FELA cases jury trial was part of the remedy;[24] and in a series of per curiam opinions the Supreme Court has reversed judgments of lower courts that had substituted their views for that of the jury in non-FELA or Jones Act cases.[25]

The question whether the Seventh Amendment bars the Courts or Congress from establishing different measures of judicial control for different types of cases or whether the preservation of right to jury trial requires no more than adequate judicial control to preserve its common law character,[26] remains unresolved.

If the Seventh Amendment is to control tests of sufficiency and require uniformity in the exercise of jury trials in federal courts, this would seem to require uniformity in the granting or denying of directed verdicts, since there is no room for balancing.

[21] *International Terminal Operating Co.* v. *N. V. Nederl. Amerik Stoomv. Maats.*, 393 U.S. 74, 1968.

[22] *Rogers* v. *Missouri Pac. RR* 352 U.S. 500, 508 n 18, 1957.

[23] *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 370 U.S. (private antitrust, referring to FELA cases among others, in stating appropriate tests for directed verdicts), *Dick* v. *New York Life Ins. Co.* 359 U.S. 437, 445 n 8, 1959 (referring to FELA cases as references for directed verdict standards, while not saying whether federal standards should be applied in diversity cases.

[24] *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355, 359060, 1962.

[25] *Willaims* v. *Carolina Life Ins. Co.* 1954, 348 U.S. 802, reversing CA5, 1954, 210 F2d 477; *Swafford* v. *Atlantic Coast Line R. Co.* 1955, 350 U.S. 807, reversing CA5, 220 F2d 901; *Union Trust Co.* v. *Eastern Air Lines, Inc.* 1955, 350 U.S. 907, reversing CA5 232 F2d 62; *Gibson* v. *Phillips Petroleum Co.* 352 U.S. 874, reversing CA5 (discussed in 35 Texas Law Rev. 768).

[26] *Heron* v. *Southern Pacific Co.* 283 U.S. 91, 1951.

THE EFFECT OF THE APPLICATION OF THE TESTS OF SUFFICIENCY BY THE LOWER COURTS

The effect of the application of the tests of sufficiency applied by the lower courts was to deprive the Petitioner of a trial by jury to which it was entitled ". . . under the influence—if not the command—of the Seventh Amendment (which) assigns the decisions of disputed questions of fact to the jury."[27] If this effect was limited to the Petitioner it might have little significance, but when many other federal courts throughout the country are denying other litigants jury trials, despite the unqualified mandate of the Seventh Amendment, then there is a basic conflict ". . .between the people's aspiration for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges."[28]

There is an increasing insistence in the federal courts on the advantage of obtaining an actual verdict rather than a directed verdict;[29] and any doubt should be resolved in favor of permitting a jury trial.[30]

The fundamental principle is that there must be a minimum of interference with the jury.[31]

A vital factor in federal tests is the emphasis the Supreme Court places on the part "inferences" play in sufficiency tests. The Supreme Court has said it is the jury's function to select from conflicting inferences and conclusion that which is most reasonable;[32] has said one subjected to motion for directed verdict must be given the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be drawn;[33] has

[27] *Byrd* v. *Blue Ridge Cooperative* 356 U.S. 525, 537, 1957.

[28] *Galloway* v. *United States* 319 U.S. 372, 408, & footnote 20.

[29] *Directions for Directed Verdicts: A Compass for Federal Courts, Cooper, 55 Minn. Law Rev. 903, note 1; Campbell* v. *Oliva* 424 F2d 1244, 1251-2, CA6, 1970.

[30] *Local 783 Allied Ind. Wkrs. of Am.* v. *General Electric Co.* 471 F2d 751, 756, CA6, 1973 (Michigan).

[31] Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. Law Rev. 903, 921.

[32] *Rogers* v. *Missouri Pacific R. Co.* 352 U.S. 500, 504, n 8, 1956.

[33] *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 370 U.S. 690, 696, 1962.

held that it is not the function of the court to search the record for conflicting circumstantial evidence in order to take the case from the jury;[34] has said that in passing on whether there is sufficient evidence to submit an issue to the jury the court need look only to the evidence and reasonable inferences which tend to support the case of one against whom a peremptory instruction has been given;[35] has held that it is necessary to look only to the evidence favorable to the party opposing the motion;[36] and has held on motion for directed verdict, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that are fairly deductible therefrom;[37] has held that whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference;[38] has held in an antitrust case that though there was no direct evidence of a refusal to sell, the evidence tended to indicate a purpose to monopolize as a matter of just and reasonable inference to warrant submission to the jury.[39]

Petitioner recognizes the "two-court rule" that the Supreme Court does not review findings of fact by two courts below in the absence of obvious and exceptional showing of error. An exception has been made where as here, there is a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass on the federal question to analyze the facts and to make its own independent examination of the record when federal constitutional deprivations are alleged[40] and to decide for itself facts or constructions upon which federal constitutional issues[41]

[34] *Tennant* v. *Peoria & P.U. Ry. Co.* 321 U.S. 29, 35.

[35] *Wilkerson* v. *McCarthy* 336 U.S. 53, 57, 1949.

[36] *Berry* v. *United States* 312 U.S. 450, 452-3.

[37] *Gunning* v. *Cooley* 281 U.S. 90, 94, 1929.

[38] *Lavender* v. *Kurn* 327 U.S. 645, 653, 1945.

[39] *Eastman Co.* v. *Southern Photo Co.* 359 U.S. 359, 375, 1926.

[40] *Napue* v. *Illinois* 306 U.S. 264, 271, 1958.

[41] *Kern-Limerick Inc.* v. *Scurlock* 347 U.S. 110, 121, 1953.

We start with the premise that the trial court misapprehended the significant differences between the tests of sufficiency under federal tests and those of the state of Ohio and did not evaluate their marked disparity. In using the improper tests as a basis for directed verdict, the trial court deprived the Petitioner of the jury trial guaranteed to him under the Seventh Amendment of the Constitution of the United States.

The trial court, for the purpose of the motion for directed verdict, accepted all the testimony and exhibits as admitted (F.Supp. 375 p. 525-Vol. 8, 1508, Vol. 7-1329-134A, Vol. 7-1385-6A, 1447-8A) except for 11 binding facts which the trial court held, (Petitioner claims improperly, see P-Br-1, pp. 26-31) could not be controverted; and it ruled that no inferences could be drawn which were inconsistent with them. (375 F.Supp. 524-5, Vol. 7 1447-8A) The Sixth Circuit adopted the decision of the trial court in toto. (Appendix I, 10a)

The failure of the trial court to apply proper standards to the facts was raised in P-Br 1-31.

The opinion of the Trial Court written seven months (375 F.Supp. 499) after the oral directed verdict of August 7, 1973 (Vol. 7, 1397A-1457A) contained many inaccuracies which were not supported by the record as more particularly set forth in Petition for Re-Hearing in Sixth Circuit (Appendix 15a-21a) and Br 2, p. 17-18)

The basis for the factual findings of the trial judge is set out in the footnotes 89 thru 101, 375 F.Supp. 526-531, which indicate he was searching the record for testimony unfavorable, rather than favorable to Petitioner.[42]

Petitioner's response to these footnotes appear in P-Br-1, 33 thru 57; P-Br-2, 17 et seq. and Appendix I, 15a- 1521.

While the Sixth Circuit ruled that certain binding facts found by the trial judge would not have affected the decision, (Appendix I, 10a) it had an effect since the trial judge ruled that no inferences

[42] Last par. n. 89. 375 F.Supp. 527, and court's admission in preceding sentence: "Plaintiff's assertions do appear to be within permissible bounds of inference based on the exhibits cited."

could be drawn which were inconsistent with them. (375 F.Supp. 524-5) The impact of inferences has much to do with the outcome of this case. Appellate Court did not reach this issue.

The Trial Court and the Appellate Court in adopting the lower court's findings, contrary to the teaching of *Tennant*, searched the record for conflicting evidence to take the case from the jury. By way of limited illustration in note 99, 375 F.Supp. 529, the lower court referred to a letter from ANAU July 15, 1970 speaking of a steadily decreasing demand for NSU automobiles throughout the world, but did not consider other exhibits which demonstrated the falsity of this claim. (Exhibit 883, which speaks of extremely large production of ANAU cars for 1970, "covering a sizeable slice of the auto market in Germany and importing nations." (*See Br 2-17-18 for details*); and in note 100, 375 F.Supp. 529, a quotation is taken out of context and does not quote that part of the exhibit favorable to Petitioner. (See P-Br-1, 33 thru 57; Br-2-17 et seq) 15a-21a, for Petitioner's Response to these objections.)

By way of further limited illustration the court stated no certificate of conformity, with reference to the tie-in product, RO-80, had ever been produced. It was produced, Exhibit 279, was offered and read into the record (Vol. 336-7A, P-Br-1-54-5, P-Br-1-3 for detail).

The foregoing references demonstrate that the lower courts were not following the teaching of *Rogers*, supra, that it was the function of the jury to select from conflicting inferences and *Continental*, supra, that Petitioner should have been given the benefit of all inferences which the evidence fairly supports even though contrary inferences might be drawn, nor the teaching of *Tennant*, supra, that the court's function is not to search the record for conflicting circumstantial evidence in order to take the case from the jury, nor the teaching of *Wilkerson*, supra, that the court need only look to the evidence and reasonable inferences which tended to support case of Petitioner, nor the teaching of *Berry*, supra, that it was necessary to look only to the evidence favorable to Petitioner, nor the teaching of *Lavender*, supra, that where fair-minded men may draw different inferences, a measure of speculation and conjecture is required by those whose duty it is to settle the dispute by choosing what seems to them to be the

most reasonable inference and only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.

The Sixth Circuit, in adopting the decision of the District Court, by implication approved the standards used in the trial court. If the District Court erred in its choice of standards of sufficiency to withhold direct verdict, then the Sixth Circuit erred equally, for both courts are bound by the same standards of sufficiency.[43]

CONCLUSION

Since the question of applicability of standards of sufficiency to withstand directed verdict involves the question of deprivation of jury trial under the Seventh Amendment and a determination of whether proper standards were used, is necessary for a disposition of this case, a writ of certiorari should issue to review the opinions and judgments of the Circuit Court of Appeals for the Sixth Circuit and of the District Court for the Eastern District of Michigan, Southern Division.

Respectfully submitted,

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Dated: September 24, 1974

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[43] *Continental Co.* v. *Union Carbide* 370 U.S. 690, 1961, n 6.